

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

|   |   |                |
|---|---|----------------|
| <b>IN RE: ENBRIDGE PIPELINES</b>                      | ) |                |
| <b>(ILLINOIS) L.L.C.</b>                              | ) |                |
|   | ) |                |
|   | ) | <b>07-0446</b> |
|   | ) |                |
| <b>Application pursuant to Sections 8-503, 8-509,</b> | ) |                |
| <b>15-101 and 15-401 of the Public Utilities Act/</b> | ) |                |
| <b>Common Carrier by Pipeline Law to construct</b>    | ) |                |
| <b>and operate a petroleum pipeline,</b>              | ) |                |
| <b>and for an order granting authority to take</b>    | ) |                |
| <b>Private Property by Eminent Domain</b>             | ) |                |

**INITIAL BRIEF OF  
PLIURA INTERVENORS**

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**INITIAL BRIEF OF  
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**I. INTRODUCTION**

NOW COME the various farmers, landowners and trustees previously identified for convenience purposes as the “Pliura Intervenors” by nature of their common representation in these proceedings by Thomas J. Pliura, M.D., J.D., and respectfully offer the following simultaneously filed Initial Brief in opposition to the Application of Enbridge Pipelines (Illinois) L.L.C. for a certificate in good standing, authorization to construct, operate and maintain a petroleum pipeline, and for an order granting Applicant authority to take private property by Eminent Domain.

**II. STANDARD/BURDEN OF PROOF**

The Common Carrier By Pipeline Law states, “The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly

filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate.” 220 ILCS 5/15-401(b) (West 2006). It is the burden of the Applicant to establish by substantial evidence, each of elements necessary to secure the certificate. *People of Cook County ex. rel. O’Malley v. Illinois Commerce Commission*, 237 Ill. App. 3d 1022 (1<sup>st</sup> Dist. 1992)

Applicant has also requested eminent domain authority in connection with this project. Applicant seeks authority under 220 ILCS 5/8-503 and 509 to take private property for this private use. Without a certificate of good standing, Applicant must prove by clear and convincing evidence that the acquisition of the property for private ownership or control is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.” (735 ILCS 30/5-5-5 (c) (West 2008)).

### **III. ANALYSIS**

#### **A. Summary of Position of Pliura Intervenor**

With respect to the certificate requirements of the Common Carrier by Pipeline Law, set out above, it is the position of the Pliura Intervenors that Applicant has failed to meet its burden on every point. As an overview, the record evidences that Applicant is seeking certification and eminent domain power not for a documented, established, or identifiable benefit to the citizens of Illinois, but rather to expand their private enterprise to new markets in a cost-saving manner.

As statutorily required, Applicant has failed to demonstrate that the Application is properly filed, in that necessary parties to the Application are missing. Despite this fact, Applicant urges the Illinois Commerce Commission to consider the financial position and

industry experience of these non-parties to fill in the gaps of missing information in the Application.

Also with respect to whether the Application is properly filed, it is noted that twice Applicant has not secured the approval of the Federal Energy Resources Commission (FERC) of its rate/tariff structure in order to provide the service sought, transport of petroleum product. Both rate/tariff applications by Applicant's non-party affiliates have been rejected by the FERC as not being just and reasonable.<sup>1</sup> Applicant's proposals included unreasonable and discriminatory pricing. The instant application is premature without FERC approval. Regardless, the Illinois Commerce Commission must look to the proposed rate/tariff structures for Applicant's intentions. There, the Commission will find that Applicant intends to utilize discriminatory pricing, which disqualifies it for Common Carrier Status. 220 ILCS 5/15-401(c) (West 2006). ("Each Commerce Carrier by Pipeline shall provide adequate service to the public at reasonable rate and without discrimination.")

Next, Applicant has failed to meet its burden to demonstrate a public need for the proposed pipeline. Applicant has made no showing that the citizens of Illinois will reap any benefit from this proposal. Whether the proposed pipeline is viewed as a stand-alone project, as stated by the Applicant, or as part of a multi-legged project to transport Canadian petroleum product from Western Canada to the Gulf Coast region of the United States, as recognized by the Staff, Applicant has failed to establish a public need. Rather, the record evidences Applicant's need of additional pipeline capacity merely to transport and sell more petroleum product in new markets. The benefits of the proposed project inure to Applicant, its affiliates, and to the shippers who intend to use the pipeline.

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<sup>1</sup> Plura Exhibit 1.2 and Shelby Exhibit 5.1.

With respect to the fitness and willingness of the Applicant to carry out this project, again the Applicant has failed to meet its burden. Enbridge Pipelines (Illinois) L.L.C., is the only applicant to this proceeding. Enbridge Pipelines (Illinois) L.L.C. is a newly formed limited liability company, organized in the state of Delaware with its primary office being located in Houston, Texas. Despite the use of the word “Illinois” in its chosen name, it has little if any real association with the state, other than to use the state as a highway to transport its product down to the Gulf Coast. It has offered no financial information and it has no industry experience. To the extent that the Illinois Commerce Commission is willing to allow Applicant to supplement its own missing information by offering information from non-party affiliates, the Illinois Commerce Commission must also consider these affiliates last year committed over 500 separate violations of wetland, environmental and safety regulations in the northern leg of this multi-leg pipeline. Nothing in the record indicates that such violations will not occur in Illinois.

As to public convenience and necessity, the Applicant has failed to demonstrate that the public convenience and necessity requires issuance of the certificate. Applicant has urged that the pipeline contemplated from Flanagan, Illinois to Patoka, Illinois is for the public convenience and necessity. Yet, the evidence demonstrates that all refineries in Illinois are at capacity and the product transported to Patoka will be further moved to Southern United State refineries. Simply stated, the pipeline at issue, is part of a multi-legged enterprise undertaken by the Applicant to transport petroleum product from Western Canada to refineries in the Gulf Coast region for the benefit of the Applicant.

Finally, there is the issue of eminent domain. It would have been unnecessary for Applicant to file this application if it did not seek condemning authority. Eminent domain, therefore, is the real purpose of this application. Applicant has so admitted. Applicant has failed to show that the proposed project is primarily for the benefit, use, or enjoyment of the public and failed to show the proposed project is necessary for a public purpose, but rather for private enterprise gain. When viewed in a light most favorable to Applicant, any ancillary benefit to the general public is debatable. There is no showing whatsoever that the project primarily benefits the public. The project is not open to public use and the pipeline is not necessary for a public purpose. It is instead a private commercial venture of no greater public purpose or benefit than any other private commercial venture.

**B. Public Convenience and Necessity**

**i. No significant benefit to the public**

As stated above, it is the Applicant's burden to prove that the public convenience and necessity requires issuance of the certificate. Pursuant to the Public Utilities Act, the ICC has regulatory authority over any owner, operator or manager of pipeline used for common carriage, *within the State of Illinois*. 220 ILCS 5/15-201. A "public utility" is any business, operating for public use, a facility or equipment used in any enterprise so closely and ultimately related to the public, or to any substantial part of the community, as to make welfare of the public dependent on proper conduct of such business. *Eagle Bus Lines v. Illinois Commerce Commission*, 3 Ill.2d 66, 81 (1954). The purposes of the Illinois Public Utilities Act is to "assure the provision of efficient and adequate utility

service to the public at a reasonable cost.” *Illinois Power Company v. Illinois Commerce Commission*, 111 Ill.2d 505, 512 (1986) (citations omitted).

In that context, certifying a proposed pipeline as a common carrier by pipeline, the ICC must determine whether an Illinois public convenience and necessity exists. The intent of the General Assembly is clear from the plain language of the Public Utilities Act; the statute was expressly enacted to regulate public utilities and common carriers by pipeline for the convenience and necessity of the citizens of that State of Illinois. The statutory process also authorizes receipt of evidence from other *Illinois* regulatory and state agencies. 220-5/15-401(b)(1)-(7) 220 –5/1-102 (West 2006). To that end, the Applicant is obligated to present evidence which supports an *Illinois* public convenience and necessity, not convenience and necessity to further Applicant’s private enterprise. Without sufficient evidence on this point, related to the Illinois public, approval can not be granted.

In the context of discussing public necessity and convenience, the Illinois Commerce Commission has turned to the Illinois Supreme Court for guidance. In *Roy v. Illinois Commerce Commission*, 322 Ill. 452, 458 (1926), the Court stated that the “convenience and necessity required to support an order of the Commission is that of the public and not any individuals or number of individuals.” In *Roy* the Supreme Court rejected the Commerce Commission’s Certificate of Convenience and Necessity for construction of a new a railroad projected to operate from one point to another on an existing rail line as it did not meet the convenience or needs of the Illinois citizens exposed to the threat of eminent domain. *Id.* at 458-460. The Court noted that “[i]n every application of this kind, the primary controlling interest to be considered is the public

interest. Individuals or corporations may determine with themselves what their interest demand, but the convenience and necessity required to support an order of the Commission is that of the public, and not of any individual or number of individuals.” *Roy*, 322 Ill. at 458. (citation omitted).

The ICC has adopted this broad approach determining that the public is larger than a limited number of market players and the need of a few does not in and of itself establish a public need. *Lakehead Pipeline Company v. Illinois Commerce Commission*, 296 Ill. App. 3d 942, 956 (3rd Dist. 1998). In the instant case, the Applicant has espoused where convenient, a regional, national and even global approach to support a public need for the proposed project. However, when the evidence presented by Applicant was challenged, a subterfuge was revealed.

**a. Stand-Alone Project**

Applicant has always positioned the proposed pipeline project to traverse Illinois from Flanagan to Patoka as a stand-alone project. In that light, the construction of the pipeline will only result in the movement of the petroleum product currently delivered to Flanagan, Illinois to storage facilities in Patoka, Illinois. There are no identifiable “take outs” in route<sup>2</sup> and there are no refineries in Patoka.<sup>3</sup> The Applicants presented no competent evidence that the product delivered to Patoka via the proposed pipeline will be transported to Illinois refineries for processing. Despite rhetoric contained in numerous filings by Applicant, when challenged under cross-examination, Applicant’s witnesses testified that Illinois refineries are operating at maximum capacity,

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<sup>2</sup> Enbridge Exhibit 7P, 7BB.

<sup>3</sup> Charles Cicchetti, expert for the Applicant, identified with some difficulty the four refineries located in Illinois, including Lemont, Joliet, Wood River and Robinson. (Cross-Examination of Cicchetti, pp 570-571, July 9, 2008).

are saturated, and none were experiencing crude oil shortages.<sup>4</sup> Applicant's witness confirmed under cross-examination, contrary to Applicant's implications, that no refinery expansions are currently planned to absorb the petroleum product to be delivered to the Patoka storage facilities. Cicchetti admitted under vigorous cross-examination that, in contradiction to his direct testimony, he had no knowledge of any refinery upgrades in the Midwest, including Illinois; and could not identify any scheduled upgrades but in a nebulous panacean prediction of the future.<sup>5</sup> Clifford Cook, Senior Vice President of Supply, Distribution and Planning for Marathon Petroleum Company, testified on behalf of Applicant that Marathon will not upgrade the Robinson, Illinois Refinery to accommodate additional Canadian crude product because such upgrade is not economically feasible.<sup>6</sup> The record is clear and undisputed that the product being shipped to the Patoka storage facility is not destined for Illinois refineries. This evidence begs the question – what benefit has Applicant identified that will inure to Illinois citizens?

The only benefits attributable to the movement of petroleum product from Flanagan, Illinois to the Patoka storage facilities is negligible and suspect in light of the record as a whole. Cicchetti testified that Illinois citizens will benefit from the current project by the creation of jobs to build the pipeline, which he admitted would be the same benefit to Illinois regardless of whether Applicant obtains certification and eminent domain power and are negligible when weighed against the long-term impact to

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<sup>4</sup> Cross-examination of Dale Burgess, p 227-228, lns 19-22 and 1-5 respectively, July 8, 2008; cross examination of Charles Cicchetti, p 634-635, lns 18-22 and 1-6, respectively, July 9, 2008; Enbridge Exhibit 7B and 8A.

<sup>5</sup> Cross-examination of Charles Cicchetti, p. 608, lns 5-15. July 9, 2008.

<sup>6</sup> Cross-examination of Clifford Cook, p. 995, lns 4-16, July 23, 2008.

landowners;<sup>7</sup> and potential “down stream” natural disaster disruption of refinery processing.<sup>8</sup> However, the issue of “down stream” interruption is a red herring. Applicant has failed to explain how storage in Patoka, Illinois, with no designated pipeline system to transport petroleum product to refineries in Illinois, will compensate for refinery processing disruption elsewhere. Further, the record evidences that natural disasters can impact the integrate system that delivers petroleum products into and throughout the United States. Cicchetti recognized the potential threat of distributing through tornadoes and earthquakes.<sup>9</sup> Clifford Cook admitted that Marathon, a major investor in Western Canadian Sand Oil would have to contend with disruption of petroleum product transport in Canada due to extreme cold temperatures.<sup>10</sup> As a business decision, Marathon invested millions of dollars in their Gulf Coast refinery, instead of investing in the Robinson, Illinois refinery.<sup>11</sup> Clearly, despite being subject to the hurricane specter raised by Applicant, Marathon, as a business enterprise, deemed it economically beneficial in invest in the Gulf Coast region, as opposed to the Mid-West. As stated, the thunder of hurricane related disruptions is but a distraction in terms of relevance to the proposed pipeline project.

The only other potential Illinois citizen benefit raised by Applicant is the adding of spare capacity to the global market, but Cicchetti admitted the gain was realized through the construction of the Southern Access Expansion Project, subject of ICC filing 06-0470, which when completed, will deliver petroleum product from Canada to

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<sup>7</sup> Cross-examination of Charles Cicchetti, p. 582-582, lns 19-22 and 1-11, respectively and p. 584, lns 2-7, July 9, 2008.

<sup>8</sup> Cross-examination of Charles Cicchetti, p. 581-582, lns 19-22 and 1-18, respectively, July 9, 2008.

<sup>9</sup> Cross-examination of Charles Cicchetti, p. 581, lns 3-18, July 9, 2008.

<sup>10</sup> Cross-examination of Clifford Cook, p. 1000, lns 16-19; and p. 1002, lns 8-12, July 24, 2008.

<sup>11</sup> Cross-examination of Clifford Cook, p. 995, lns 17-22 and 1-11, respectively, July 23, 2008.

Flanagan, Illinois.<sup>12</sup> Cicchetti also admitted that such global market benefit to Illinois citizens would be realized if any pipeline transported Canadian crude anywhere into the United States.<sup>13</sup> This sentiment was echoed by John Felmy, Chief Economist for the American Petroleum Institute, an intervenor in this matter, who admitted he had not reviewed the current application and that his testimony focused solely on support of building additional capacity of pipelines anywhere to enhance the United States Market.<sup>14</sup> Such evidence hardly satisfies Applicant's burden of proof by substantial evidence a public need.

The true benefit of moving Canadian crude to Patoka is not for the benefit or convenience of the citizens of Illinois, but rather for the financial benefit of Applicant and other market partners. As explained by Clifford Cook, Marathon would displace current, more expensive "sweet oil" received for the Gulf Coast, by cheaper "sour oil" from Canada as a marketplace decision.<sup>15</sup> However, no witness offered competent testimony to support that any cost-benefit enjoyed by Illinois refineries, in processing Canadian petroleum product, would inure to the benefit of the citizens of Illinois. Even Cicchetti admits, and wisely so based upon the unpredictable oil market, that a grant by the Commission of a certificate in good standing will not result in cost savings at the pump for Illinois citizens.<sup>16</sup> As a stand-alone project, Applicant has utterly failed to produce any competent evidence to sustain its burden in proving that the proposed

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<sup>12</sup> Cross-examination of Charles Cicchetti, p. 564-565, lns 22 and 1-3, respectively and p.566, lns 3-11, June 9, 2008.

<sup>13</sup> Cross-examination of Charles Cicchetti, p.57-568, lns. 19-22 and 1-12, respectively, July 9, 2008.

<sup>14</sup> Cross-examination of John Felmy, p. 765, lines 13-19, p. 759-760, lns 14-22, and 1-4, respectively.

<sup>15</sup> Cross-examination of Clifford Cook, p. 22-23, lns 22 and 1-8, respectively and p. 1025-1026, lns 9-22 and 1-16, respectively.

<sup>16</sup> Cross-examination of Charles Cicchetti, p. 589, lns 17-21, July 9, 2008.

pipeline project is necessary in meeting the public need and convenience of Illinois citizens.

**b. Segment of Multi-Phase Project**

The Staff has adopted the position, contrary to Applicant's stand, that the current proposed pipeline is part of a multi-legged project undertaken by Applicant, and/or one or more of its various related affiliates, to build a pipeline to transport Canadian petroleum product from Western Canada to the Gulf Coast Region of the United States. Despite Applicant turning a blind eye to this proposition, the Staff, in reaching this conclusion, considered the copious exhibits introduced into the record, which support this proposition.

Of most importance is an examination of the actions of the Applicant in its apparent abuse of this process in cloaking its intentions to build not a stand-alone project, but rather a pipeline intended to pass petroleum product through the State of Illinois on its route to the Gulf Coast Region.<sup>17</sup> As expressed by Staff, such evidence calls into question the Applicant's justification for the Southern Access Expansion Pipeline.<sup>18</sup> Why not unveil the proposed pipeline for what it clearly is, a segment of a continuous pipeline to transport Canadian petroleum products to the southern United States?

Plainly stated, applicant believed the evidence presented in support of its bid for certification ran contrary to championing the proposal as a segment of a multi-phased project. Applicant would be justified in this belief. How can Applicant raise avoidance of the specter of hurricane disruption as a benefit to the citizens of Illinois, when its clear intent is to ship the product delivered to Patoka, Illinois to the Gulf Coast region? How

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<sup>17</sup> The first segment of this project was considered by the Commission in Application No. 06-0470, which also is silent as to the true expanse of Applicant's project. Pliura Intervenor Exhibit 10D

<sup>18</sup> Direct testimony of Mark Maple, Exhibit 1-0, p. 5, lns 76-81

can Applicant exalt the benefits to Illinois or even Mid-West refineries with delivery of the Canadian petroleum product to Patoka, when the product will be diverted to the Gulf Coast Region? How can Applicant justify subjecting the citizens of Illinois to threat of eminent domain, when the utility being regulated has no direct application to Illinois markets, but rather, will be transported from the state to new markets available to the sole benefit of Applicant. Rhetorically, Applicant cannot.

The Staff's recommendation, set forth in Mark Maple's Rebuttal Testimony, fails to recognize the evidence presented by Applicant in this light.<sup>19</sup> The evidence relied upon by the Staff was offered in support of a stand-alone project. In that context, as previously argued, the evidence fails to deliver support for certification. The Staff clearly makes romanticized assumptions as to the benefit of Illinois citizens as members of a global community.<sup>20</sup> While Applicant's witnesses offered supposition of regional, national and global benefits, the record contains no concrete evidence that the construction of the proposed pipeline will reduce fuel costs for the citizens of Illinois, stabilize oil prices in the United States to the benefit of Illinois citizens, or address capacity short-fall, that Applicant admits does not exist, which would benefit Illinois citizens.<sup>21</sup> Any witness who could offer such definitive analysis that the construction of this pipeline will resonation global oil market impact should apply for a position in Washington, D.C. with the current administration, which is struggling to address these very complex issues.

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<sup>19</sup> ICC Staff Exhibit 73.0.

<sup>20</sup> ICC Staff Exhibit 3.0, pp. 6-7, Ins 101-111, and 112-116, respectively.

<sup>21</sup> Cross-examination of Dale Burgess, pp. 228, Lns 3-5, p. 229, Ins 13-16, July 8, 2009; Cross-examination of Douglas Aller, p. 388, Ins 10-14; Cross-examination of Charles Cicchetti, p. 634-635, Ins. 19-22 and 1-6, respectively, July 9, 2008.

As recognized by the Staff, the economic model offered by Cicchetti in support of the present project only reiterated the economic benefits gained by the citizens of Illinois by completion of the Southern Expansion Access project, Application N. 06-0470, with no additional benefits identified for the current proposed project.<sup>22</sup> Beyond that irrelevant and inconsequential evidence, the record is silent as to any unchallenged specific, analytical, defined economic benefits to be realized by the citizens of Illinois, whether directly or indirectly, if the current contemplated project is built.

The evidence submitted by Applicant does not address the convenience of the pipeline for the Illinois public. As stated in *Lakehead* “[t]he public need aspect of the statute serves to protect and restrict the exercise of such powers as eminent domain.” 269 Ill. App. 3d at 952. The State is not required to provide condemnation powers and without proof that the statutory prerequisites of the common carrier by pipeline law have been met, certification and condemnation authority should not follow. *Lakehead*, 269 Ill. App. 3d at 952. In light of such a void of evidence, certification cannot be granted.

### **c. Landowner Issues**

Public convenience and necessity touches upon the immediate impact on the citizens of Illinois if Applicant is granted certification, including routing, treatment of landowners, impact upon municipalities and governing bodies, and whether eminent domain is necessary to complete the proposed project. Applicant’s actions in route selection, and in interaction with landowners and municipal bodies support that the only party to benefit from this enterprise is the Applicant and its business partners.

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<sup>22</sup> Direct Testimony of Mark Maple, Exhibit 1.0, pp. 8-9, Ins 147-149 and 150-159, respectively, January 7, 2007.

For example, Applicants admit that the “preferred route”, which is approximately 170 miles long, was determined without any input from the citizens or governmental bodies potentially effected by the route.<sup>23</sup> In fact, Applicant apparently failed to recognize and, therefore, consider the complications arising from traversal of 33 miles of land under coal severance deeds.<sup>24</sup> Under cross-examination, Applicant’s witness revealed that while 14 miles of the proposed route ran adjacent to an existing pipeline controlled by one of Applicant’s affiliates, it would rather obtain eminent domain rights to these affected landowners, than shift the route to coincide with the existing pipeline easement.<sup>25</sup> The route selected was for the primary benefit of Applicant, and not convenience of affected landowners.<sup>26</sup> In keeping with this theme, Applicant has failed to address complaints raised by various landowners with regard to unauthorized entry upon their property by representatives or agents of Applicant,<sup>27</sup> and used heavy-handed negotiation techniques with landowners.<sup>28</sup>

The right-of-way and easement grants currently being offered to affected landowners contains onerous conditions. Applicant seeks easement rights for the pipeline right-of-way to accommodate two pipelines that Applicant can replace, relocate or abandon in place at will.<sup>29</sup> When asked by Staff if Applicant was seeking easements for

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<sup>23</sup> Cross-examination of Douglas Aller, p. 370, Ins 4-21 and pp. 408-409, Ins 15 – 22 and 1, respectively, July 8, 2008. Enbridge Exhibit 7H, attachment C.

<sup>24</sup> Cross-examination of Dale Burgess, pp. 266-267, Ins 21-22 and 1-5, and pp. 270-271, Ins 21-22 and 1-2 respectively, July 8, 2008; Cross-examination of Douglas Aller, pp. 403-404, Ins 14-22 and 1-21, respectively, July 8, 2008.

<sup>25</sup> Cross-examination of Douglas Aller, p. 378, Ins 7-17 and p. 380, Ins 1-14.

<sup>26</sup> Pliura Intervenor anticipate counsel representing municipalities, governing bodies and other parties who intervened, will address their specific concerns and adopt any arguments filed by said intervenors against granting of certification.

<sup>27</sup> Cross-examination of Douglas Aller, p. 430, Ins 10-14; p. 431, Ins 16-20; and pp. 431-432, Ins 21-22 and 1-7.

<sup>28</sup> Pliura Exhibit 1.0, p. 300, Ins 9-19, and page 594 Q20 and Response.

<sup>29</sup> Rebuttal testimony of Carlisle Kelly, Attachment 3, April 7, 2008.

multiple lines, Applicant deceived the Staff in its response.<sup>30</sup> The terms of the current sought after easement is relevant for consideration. As a party with a certificate in good standing and eminent domain authority, Applicant will subject Illinois citizens to demands for its own economic benefit.

Finally, Applicant has failed to address evidence of negative environmental impact of mining and processing tar sands in Canada. Stephen Hazell, Executive Director of the Sierra Club of Canada, has testified that the negative environmental aspects caused by mining Canadian tar sands far outweigh any perceived benefits to the project.<sup>31</sup> First, Casey Mulligan has testified that because Cicchetti ignored the adverse environmental costs, his economic analysis was flawed.<sup>32</sup> Applicant has made no showing to refute this significant evidence.

#### **d. Eminent Domain**

Applicant has also failed to show a need for eminent domain authority in order to complete the proposed project. Applicant has admitted, although negotiations landowner easement rights are progressing slowly, to date, there are no identifiable hold-outs impeding immediate construction of the pipeline.<sup>33</sup> Further, Applicant has admitted that Applicant has not been forced to consider re-routing or “zig-zagging”, as characterized by Peter Coldwell, due to landowner hold-out.<sup>34</sup> In fact, the lack of a single iota of evidence of “inefficient land use by zig-zagging” renders Coldwell’s entire testimony merely speculative and not competent for consideration by this tribunal. Applicant has admitted it can offer no evidence to support that Applicant will experience

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<sup>30</sup> Enbridge Exhibit 7KK.

<sup>31</sup> Direct testimony of Stephen Hazell, Pliura Exhibit 7.0, p. 22 Q11 & Response, and 7.1.

<sup>32</sup> Direct testimony of Casey Mulligan, Exhibit Pleasant Murphy Intervenors, pp. 25-27.

<sup>33</sup> Cross-examination of Douglas Aller, pp. 414-415, Ins 7-22 and 1-5, respectively, July 8, 2008.

<sup>34</sup> Cross-examination of Douglas Aller, pp. 413-414, Ins 22 and 1-6, respectively, July 8, 2008.

any additional costs if eminent domain authority is not tangentially awarded;<sup>35</sup> or that the pipeline will not be build without such authority.<sup>36</sup> Actively, Applicant has hired contractors,<sup>37</sup> and purchased equipment<sup>38</sup> and pipe for the construction of the pipeline at issue, all without the benefit of secured eminent domain power.<sup>39</sup>

The strongest evidence asserted by Applicant for lack of necessity of eminent domain authority is its representation that currently 80% of the preferred route is under easement, whom Applicant obtained in its merger with Central Illinois Pipeline Company.<sup>40</sup> Douglas Aller confirmed that Applicant decided on the preferred route because “through acquiring avoidance of the Illinois Commerce Commission (ICC) certificate of need process and associated potential land condemnations is maximized.”<sup>41</sup> This pre-eminent domain authority business decision, coupled with the pre-eminent domain business decisions to implement, in varying stages, the contiguous pipeline from Western Canada to the United States Gulf Region evidences that Applicant will build this pipeline in the absence of eminent domain power.

### **C. Fitness of the Applicant**

#### **i. True identity of Applicant is unknown**

Before the Illinois Commerce Commission can make a determination as to the fitness of the Applicant, it is necessary to fully understand who the Applicant is, and who it is not. The only entity that is a part to the Application is Enbridge Pipelines

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<sup>35</sup> Cross-examination of Dale Burgess, p. 233, Ins 12-16, July 8, 2008.

<sup>36</sup> Cross-examination of Dale Burges, p. 183, Ins 6-11; Cross examination of Douglas Aller, p. 415, Ins 6-12.

<sup>37</sup> Enbridge Exhibit 8F.

<sup>38</sup> Enbridge Exhibit 7R.

<sup>39</sup> Cross-examination of Dale Burgess, p. 278, Ins 18-22.

<sup>40</sup> Cross-examination of Douglas Aller, p. 436, Ins 16-22, July 8, 2008.

<sup>41</sup> Cross-examination of Douglas Aller, pp. 409-410, Ins 16-22 and 1-6, respectively, July 8, 2008, citing to Enbridge Exhibit 7H, attachment C.

(Illinois), L.L.C.,<sup>42</sup> although Applicant acknowledges its affiliations with Enbridge, Inc., and various other affiliated companies. But which entity or entities are subject to the Commission's character and fitness evaluation? When touting its history and experience in the pipeline business and its record of safety and compliance (at least before its Wisconsin troubles discussed below) Enbridge is one big company. But in negotiations with landlords for easement rights, and the potential future liability for any long-term environmental or safety hazards posed by the pipeline, only the applicant, a limited liability company, appears on the documents. By segregating its assets and liabilities in this way, Enbridge creates a straw man that can be knocked down whenever it suits Enbridge, Inc., to do so. Yet, before this Commission, Enbridge seeks to bolster the character and fitness of this new L.L.C. by suggesting that Enbridge, Inc, or a more experienced affiliate is the true applicant. However, in assessing character and fitness, Pliura Intervenors urge the Illinois Commerce Commission to resist this manipulation by the Applicant and instead require Enbridge Pipelines (Illinois), L.L.C., as the sole applicant, to stand alone and on its own merit in determining if it meets the Commission's standard.

**ii. Applicant's Financial Status is unknown**

Beginning at Page 22, Paragraph 20 of the Initial Application, Applicant asserts that it will submit for FERC approval its rate/tariff structure<sup>43</sup> and that "[t]he requisite capital [for the instant project], now estimated to be at least \$350 million (2006 dollars), has been committed by Enbridge management and Enbridge is financially capable of

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<sup>42</sup> Enbridge Exhibit 7M.

<sup>43</sup> A more detailed discussion about the FERC filing appears below.

constructing and operating the new line...”.<sup>44</sup> Attached to the initial application are various financial reports of Enbridge affiliates. Not present, however, are the financial reports of the Applicant. Enbridge Pipelines (Illinois), L.L.C. is the sole applicant herein. Enbridge Pipelines (Illinois), L.L.C. is the only Enbridge entity that is a party to the various right-of-way/easement agreements that Applicant has presented to and/or entered into with landowners. Should a landowner need to pursue a legal remedy for a breach of such an agreement, or should a landowner or the state seek relief for damages related to the pipeline, they could look only to the Applicant and its unknown and perhaps non-existent assets. It is the burden of the Applicant, Enbridge Pipelines (Illinois) L.L.C. to prove to the Illinois Commerce Commission that it, Enbridge Pipelines (Illinois) L.L.C., has the financial ability to construct maintain and operate the proposed pipeline. Applicant has unquestionably failed to meet this burden in that there is not a shred of evidence in the record as to the financial position of Enbridge Pipelines (Illinois) L.L.C. If the financial position of a distinct affiliate of the Applicant is to be looked to to meet this burden, that asset-segregated affiliate must be a co-applicant to this petition.

**iii. Applicant has made inconsistent representations about this project**

As stated above, Applicant is Enbridge Pipelines (Illinois) L.L.C. However, throughout these proceedings, Applicant has alternatively represented itself as a single entity, where it has suited it to do so, and as a piece of a much larger organization when that representation was more beneficial. The instant proposed project is a commercial business venture. Applicant is not an oil producer or refiner. Its sole business is this pipeline and its sole source of revenue is the tariff or toll it charges to shippers for the use of the pipeline. Such tariffs and tolls are regulated by the Federal Energy Regulatory

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<sup>44</sup> Plura Exhibit 10.0.

Commission (FERC). Quite curiously, Applicant has not made application to the FERC for approval of a rate/tariff structure. Instead, two other Enbridge Affiliates have made application to FERC; Enbridge Energy Company, Inc. (“EEC”) and Enbridge Energy Limited Partnership (“EELP”). In their Joint Petition for Declaratory Order to the FERC under Docket Number OR08-1-00, EEC and EELP represent to the FERC that they will actually be the entities that construct and operate the pipeline proposed in this instant application and that they will be charging the tolls and tariffs for its use.<sup>45</sup> No mention whatsoever is made of the instant Applicant. As with the instant filing, Applicant seeks to portray itself as one big company when seeking regulatory approval, but then conveniently hides behind the asset segregation of separate entities when entering into any agreement that would expose the larger entity to liability.

Given the fact that the Applicant has ignored its burden to demonstrate financial ability to carryout this project, and the fact that financing of the project, according to Page 22, Paragraph 20 of the Initial Application, is dependant at least in part on an approved tariff structure, the Illinois Commerce Commission is without sufficient evidence to find that Applicant is willing and able to carry out this project. A negative finding is required.

#### **iv. Applicant has a history of environmental violations**

Pliura Intervenors have urged this Commission to look only to the Applicant, Enbridge Pipelines (Illinois), L.L.C., in determining character and fitness, and to resist Applicant’s attempt to leverage other non-applicant. However, to the extent that the Commission will permit Applicant to ride the coat tails of its affiliated organizations, Applicant must then take the alleged good with the bad.

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<sup>45</sup> Shelby Exhibit 5.1.

The instant application involves a single leg of an interstate pipeline project from Canada, through Wisconsin, Illinois, and on south to Texas. The Wisconsin leg was constructed by Applicant's affiliate, "Enbridge Energy, Limited Partnership".<sup>46</sup> For all practical purposes other than asset segregation and liability protection, they are one in the same.

The Wisconsin leg of this project should be looked at by the Illinois Commerce Commission for evidence of how the Applicant will undertake its responsibilities with respect to environmental stewardship and compliance. On December 19, 2008, the State of Wisconsin, on referral from of the Wisconsin Department of Natural Resources filed suit against Enbridge (2008CX000024) alleging, "Since January 2007, in the course of constructing two parallel pipelines through 14 counties in Wisconsin, defendant, [Enbridge], itself and through its agents, has performed work in and around wetlands and navigable waterways that resulted in violations of its permits and water quality certifications, causing harm to wetlands and navigable waterways and to public interests in the preservation of and protection of quality water resources, in violation of Wis. Stat. chps. 30 and 281."<sup>47</sup>

The state has alleged Enbridge committed over 500 separate violations of Wisconsin environmental regulations. These violations include such things as clearing wider areas than authorized, discharging sediment into wetlands, failing to segregate and replace topsoil, unauthorized clearing of wetlands, dumping construction debris in wetlands, discharging sediment into a river, failing to follow turtle habitat protection protocols, improper bridge construction, and ignoring erosion control requirements. This

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<sup>46</sup> Pliura Exhibit 10.0, p. 2, § 1.

<sup>47</sup> Pliura Administrative Notice, Exhibit 1.

extensive pattern of environmental violations is not indicative of isolated technical violations of onerous regulations. Instead, it suggests a very troubling and pervasive culture of conscious disregard for the environment, environmental regulations, landowner rights, and public safety. Further, these admitted violations are a stark contrast to the hollow and disingenuous safety representations made by Applicant to this Commission. See for example Page 19, Paragraph 18 of the initial Application wherein Applicant has represented to this Commission that, “Enbridge’s lines are built and maintained in accordance with industry and governmental requirements and standards, and often in excess thereof”. Unfortunately for the citizens of Wisconsin, this assertion appears to be false.<sup>48</sup>

Despite offering to Staff that all violations had resolved,<sup>49</sup> on December 30, 2008, Enbridge entered into a stipulation with the state and agreed to pay a judgment of \$1,100,000.00 for its multiple violations of environmental law.<sup>50</sup> Applicant’s confessed disregard for the environmental protection laws of the State of Wisconsin is directly relevant to the Illinois Commerce Commission’s determination of public convenience and necessity which statutorily is to include evidence regarding:

1. the environmental impact of the proposed pipeline. *Public Utilities Act*, 220 ILCS 5/15-401(b) and (b)(1);
2. the impact of the proposed pipeline transportation issues *Public Utilities Act*, 220 ILCS 5/15-401(b) and (b)(2);

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<sup>48</sup> Pliura Exhibit 10.0.

<sup>49</sup> Enbridge Exhibit 8D.

<sup>50</sup> Pliura Administrative Notice Exhibit 1.

3. the impact of the proposed pipeline or facility on any conservation areas, forest preserves, wildlife preserves, wetlands, or any other natural resource. *Public Utilities Act*, 220 ILCS 5/15-401(b) and (b)(3); and
4. The effect of the pipeline upon public safety. *Public Utilities Act*, 220 ILCS 5/15-401(b) and (b)(4).

It is the position of the Pliura Intervenors that the 500+ wetlands and environmental violations charged by the state of Wisconsin for the northern leg of this project must give pause to the Illinois Commerce Commission in assessing the character and fitness of the applicant, as well as the public convenience and necessity of the proposed project. This blatant disregard for legal obligations is also directly relevant to the Commission's determination of whether Applicant would be a good steward of Eminent Domain authority.

#### **D. Purpose of Application**

The primary purpose for the proposed project is not the benefit to Illinois citizens but rather this project will benefit the Applicant and it will benefit the large oil companies who actually own the product to be shipped through the proposed pipe.<sup>51</sup> The public will not benefit from this proposed project anymore than the public benefits when any private company starts a new business. The state of Illinois just happens to be geographically located in the path of where applicant intends to ship the product in the proposed pipe, that is, the Gulf Coast. Illinois citizens will not benefit from this project anymore than the citizens of Maine or California, or any other states. The public will not benefit and the environment will be greatly harmed.

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<sup>51</sup> Pliura Exhibit 1, pp. 597-598, Response to Q24 and Response to Q26.

This proposed project is an interstate pipeline originating in Canada. There is no Illinois access point where crude oil from the 30,000 wells in this state can enter the pipeline.<sup>52</sup> Again, this proposed project is not designed or intended to allow even a single barrel of oil produced in Illinois to be transported through the proposed pipeline. The project is designed and intended for Canadian shippers to transport Canadian petroleum products down to the United States Gulf Coast.

Similarly, since this proposed interstate pipeline is not designed or intended for Illinois producers or the Illinois public, by definition it cannot meet the definition of a common carrier by pipeline. To label the project as a common carrier is a fiction. Certainly it is not intended to be a common carrier where anyone who wished to ship product could do so. It is a private project with a relatively limited number of Canadian producers who will benefit by using the proposed pipeline to transport their product to the Gulf Coast.

As detailed above, Applicant's sole purpose of subjecting this interstate pipeline to the otherwise unnecessary application process was to secure eminent domain authority. But overlooking for the moment Applicant's motives and the unsuitability of this project for eminent domain, Applicant has made inconsistent representations with respect to the "need" for eminent domain authority. Applicant has represented to this body that it owns right of way/easement rights for the entirety of the proposed route from Heyworth to the terminus in Patoka. Wherein lies the need for eminent domain for these few landowners? The record holds no supporting evidence to warrant certification and tangential eminent domain authority.

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<sup>52</sup> Enbridge Exhibits 7BB and 8O.

## **CONCLUSION**

Considering the foregoing facts, law and evidence, the Petition for Certification of Good Standing and Eminent Domain filed by Applicant should be denied. Applicant has failed to meet its burden in proving the requisite requirements for certification.

Respectfully Submitted,

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